BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

In the Matter of: D. S., Petitioner and Counter Respondent	)	
Vs.	)	No. 04-40
Williamson County Schools, Respondant and Counter Petitioner	)	

FINAL ORDER

William Jay Reynolds
Administrative Law Judge
55 Court Street, Suite A
Savannah, Tennessee 38372

Parents pro se:
Mr. and Mrs. XXXXXXX
XXXXXXXXXXXXXXX
Nolensville, TN 37135

Attorney for School District:
Mr. Rob Wheeler, Esq.
201 Fourth Ave, North
Suite 1500
Nashville, TN 37219

To protect the confidentiality of the student, the remaining pages will refer to the student as "D".

PROCEDURAL HISTORY

On May 3, 2004 the student (hereinafter D) filed application for Due Process relief by and through his parents, pro se. Then on May 19, 2004 the Williamson County Board of Education filed application for Due Process relief and same is treated as a counter application. Both applications are properly before this tribunal. Upon due notice the claimants appeared: D, with his parents, acting pro se; and the Williamson County Board with their attorney of record, Robert G. Wheeler, Esquire. Both sides appearing submitted testimony with exhibits and were given adequate opportunity to litigate on two separate occasions. This matter was first heard on July 12th and 13th 2004 and the matter was adjourned until July 22, 2004 to permit testimony from Joann Gallagher and Dr. David Heath on behalf of D. These witnesses were unavailable for the 12th and 13th hearing. Whereupon, the matter came on to be fully and finally heard on July 22, 2004. The entire matter was heard at the location of the Williamson County Board of Education Building. Post-hearing briefs are submitted. The undersigned Administrative Law Judge received appointment May 28, 2004.

I. FINDINGS OF FACTS

The student, D. is enrolled in Williamson County Schools (Local Education Agency) here he is a rising senior for the 2004-2005 school year. Learning Disability and Attention Deficit Hyperactivity Disorder (hereinafter ADHD) are the disabilities that D is currently certified as eligible under the Individuals with Disabilities Education Act

(T. 115 and 266). The Learning Disability in the area of written expression is due to his inability to express himself in writing if he needed to write a paper or a short essay. Further, his deficit includes the lack of ability to spell. His ADHD manifests itself in that D finds it very difficult to sit in classes for long periods of time and stay on task (T. 332).

D has been attending Page High School, which is *outside his transportation zone.* D's parents made arrangements for his attendance at Page High School pursuant to the Board's out of school zone policy. This was not pursuant to the decision of his IEP team (T. 121). D was approved to attend Page High School for his *freshman year* on June 7, 2001. Then on May 20, 2002 he was again approved to attend Page High School for his *sophomore year* and again on April 14, 2003 he was given permission to attend Page High School for his *junior year* (E. 1, p. 100-109). D attended Page High School until his commission of a disciplinary infraction that resulted in his suspension to the Alternative Learning Center (T. 398-99).

In February 2004 the Williamson County Board of Education changed the Board policy regarding, "*student zoning*" (Ex. 2, p. 80). The policy provides for situations where students attending schools outside their transportation zone may request "out of zone *approval through* the out-of-zone *school principal* to continue attendance in that school so long as they provide their transportation (Ex. 2, p. 80). Additionally, the policy states in part..."any student as determined by the principal as violating school rules may be returned to the zoned school at the end of the semester. The principal's decision may be appealed to a special appeals committee comprising in part of at least one Board member appointed by the Director of Schools (Ex. 2, p. 80)."

D's educational placement was changed last school year (2003-2004) as a result of his violation of a zero tolerance offense (T. 51). A manifestation determination at an Individualized Education Program (hereinafter IEP) meeting was held and the student was moved to the Alternative Learning Center in Williamson County (T. 51).

The Zero Tolerance Committee reviewed the status of D's suspension and effective March 15, 2004 agreed for D to return to Page High School (T. 63). A letter from Dr. Heath, interim director of schools, indicated that D's probationary status would continue until the full one-year suspension ends. Probation meant that no zero tolerance misbehavior or other offense, which may result in suspension, may occur during that time (T. 63-64).

Dr. Heath's letter does not address D's continual attendance at Page High School for the 2004-2005 school year. The parents requested that their son be allowed to return to Page High School for the upcoming school year (2004-2005).

On March 29, 2004 the parents were given a letter informing them that their request for D to attend out-of-transportation zone, Page High School, had been denied (Ex. 1 p. 95). Within her authority under Board policy, Dr. Anthony, Principal of Page High School did not approve for D to continue to attend Page based on D's disciplinary record (Ex. 1, p. 93). Dr. Anthony, Principal of Page High School, testified that *all* students that had discipline issues were sent back to their zone school (T. 133). Dr. Anthony also stated that sending D back to his zone school was not a double punishment in her opinion (T. 133).

On April 21, 2004 the parents appealed the principal's decision to the Zoning Appeals Committee, which also denied the requested transfer (Ex. 1, p. 85).

D has completed his four-year required technical concentration in the carpentry cluster (T. 79). D completed a construction core and carpentry one. When he first entered Page he was under an auto program, which was canceled. Therefore, the auto program unit of his freshman year was added to Ag Mechanic maintenance class and a construction course (sophomore year). His junior year he took carpentry. He has completed four courses in vocational core courses. The State of Tennessee recognizes him as a "vocational completer" (T 139).

Ms Ginger Shirling, Coordinator for Student Support Services, stated it would not be hard for D to transition to Ravenwood High School since services are equal at both schools. Ms. Shirling testified that the services at Ravenwood would be appropriate for his disability and that predictably he could be quite successful at the new school (T. 207).

Ms. Charlotte Pitcher, Assistant Principal for Ravenwood, confirmed that the courses that D needs for graduation are provided at Ravenwood. She stated that English, government, economics and work-based learning are all courses at her school (T. 290). Further, the student may be involved in work-based learning at Ravenwood. Worked-based learning allows teachers to help students with hands on ideas and projects. Teachers in Williamson County Schools take 12 hours of technology training so they may provide worked-based learning. (T. 143)

Mrs. Pitcher stated that a club hockey team also exists at Ravenwood. Finally, she stated that even though carpentry is not a part of the curriculum at Ravenwood, the school provided "a lot of hands on courses" and further, "we differentiate for our learners that need hands on." (T. 293)

Ms. Pitcher testified that a senior project was not a part of D's IEP (T. 300).

Ms. Carol Hendlmyer, Director of Support Services in Williamson County Schools testified that the movement of D from Page to Ravenwood would not constitute a "change of placement" but would be a change of physical location (T. 260). Further, she testified the IEP could be fully implemented at Ravenwood or Page (T. 260). Ms. Hendlmyer also stated that the IEP does not guarantee specific staff but only specific services (T. 263).

At the February 12, 2004 IEP meeting, a discussion was held regarding a request for an Independent Educational Evaluation (hereinafter also referred to as IEE) (T. 41) The parents requested an Independent Educational Evaluation. The IEP team decided that it would be a benefit to have additional information regarding D to try to resolve some of the issues that the student was having. (T. 41) This commitment did not fit the ordinary IEE request in that the school district had not first completed an evaluation for the parent to disagree with, but the District concedes it agreed to provide for the IEE. (Ex. 2/12/04 IEP, T. 23-25)

On February 19, 2004, the names of two independent evaluators were given to the parents, Dr. Francis Joseph McLaughlin, III and Dr. David Elkins. (Ex 2 p. 43). Dr. McLaughlin, III is a licensed psychologist who earned his doctorate in Developmental Psychology from Peabody College in 1979. (Ex. 2, p. 67) He is currently a private psychologist practitioner, and he has taught both graduate and undergraduate courses in psychology. (Ex. 2 p. 67-72) He has also authored and co-authored numerous publications on multiple topics involving issues of psychology, and he is a member of the American Psychological Association, the Autism Society of America, the Society of Developmental and Behavioral Pediatrics and the Tennessee Psychological Association.

(Ex. 2. p. 67-72) Dr. David Elkins earned his doctorate in clinical psychology from the Peabody College of Vanderbilt University in 1977, and he is currently a private psychologist practitioner who works with children, adolescents and adults. (Ex 2 p. 86-88) His areas of expertise include learning and attention issues. (Ex. P. 86)

On March 22, 2004 the school district offered to the parents two additional qualified individuals who could conduct the IEE. Dr. John W. Fite is a licensed psychologist who earned his doctorate in major-counseling psychology from Tennessee State University in 1997, and he works as a psychologist with the TCMC Psychiatric Group in Franklin. (Ex. 2, p. 73-79) He performs psychotherapy and assessment services for children and adolescents, and he works extensively with students referred by the Williamson County School System. (Ex. p. 74) Dr. Joseph D. LaBarbera is a licensed psychologist who earned his doctorate in clinical psychology from Vanderbilt University in 1977. He has published extensively and is a member of several professional associations. He is currently on staff at the Vanderbilt Medical Center, and is a professor with the Department of Psychiatry at the Vanderbilt University School of Medicine, and an assistant professor with the Departments of Psychology and Psychology and Human Development at Vanderbilt University. (Ex. 2. p. 61)

The parents rejected all four of these qualified psychologists to conduct the Independent Educational Evaluation. The parents stated they would have the Educational Enhancement Center in Massachusetts conduct the evaluation and was requesting that the school district pay for the evaluation. (Ex. 2, pp. 60-79, 86-88)

Dr. Carl Hendlmyer, Director of Student Support Services for Williamson County Schools testified that the District had no knowledge of the qualifications of the

individuals who conducted the IEE for D at the Educational Enhancement Center. (Tr. 267-72) The parents provided no proof of the qualifications.

The Massachusetts referral stated that they would evaluate D in four major areas: "A comprehensive review and evaluation of D's previous testing; evaluations, diagnosis, both school based and private doctors; school IEP records, and other records; personal interview and evaluation sessions; specific testing to determine his current level of capabilities, characteristics and disabilities; and comprehensive report of their findings; recommendations for additional evaluation, if any; recommendations for additional therapy or remedial services; recommendations for appropriate educational services and placement; educational earning achievement goals for the student; a plan for certifying his progress over time." (T. 49) The Educational Enhancement Center, Newton Center, Massachusetts is headed by Dr. Penny Prather (T. 100).

The parents intend for the Williamson County School System to pay the $3,400.00 for the Boston evaluation (T. 99). This amount includes Four Hundred and No/100 ($400.) Dollars for an educational evaluation, Six Hundred and No/100 ($600.) Dollars for a psychological evaluation and Two Thousand, Four Hundred and No/100 ($2400.) Dollars for a neuropsychological evaluation (T. 352). When asked what the parent would like done with the IEE, the parent stated the recommendations of the IEE should be considered by an IEP Team and those that the Team determined appropriate should be incorporated into the revised IEP (T. 93).

Boxborough City Schools, Mass previously had paid for a portion of an evaluation completed by the Educational Enhancement Center in Newton Center. (T. 118)

II. ISSUES

1. Whether, even though the local education agency acquiesced to the need for an IEE. the local education agency (the Williamson County Tennessee School District) should pay for an Independent Educational Evaluation when the parents unilaterally select their preferred provider (Massachusetts based Educational Enhancement Center in Newton Center, Mass) rather than a qualified Tennessee provider (one from a panel of four)?

2. Whether the Commissioner of Education fails to provide opportunity for a free appropriate public education to a student when the local agency (Williamson County Schools) adopts and implements a policy wherein a school principal may return the child to the "zoned school" at the end of the semester on determination that the student has violated school rules due to a zero tolerance discipline infraction occurring during the student's 2003-2004 year at the "out of zone" high school?

III. LAW AND ARGUMENT

Tennessee Code Annotated, § 49-6-3102 Assignment of students by local board expressly authorizes and requires each local school system, with respect to the schools under its jurisdiction, to establish school zones and other policies relating to students attending their home school zone or another. Williamson County Board of Education has a school zone policy which has been amended several times as the county has grown. However, it appears the local education agency has complied with the binding language of the statute. Tennessee Code Annotated, § 49-6-3103 proceeds to sets forth the criteria the board *may* consider and base its' decision in the assignment of students.

The statutory directive is tentative in that it informs the agency of the manner in which the agency is to exercise discretion. Generally agencies are obligated to follow their own rules and are bound by those rules even if they become inconvenient.

The term, "*change of placement*" is a term of art in the Individuals with Disabilities Education Act (hereinafter IDEA). It has been misunderstood by many administrators and parents through the history of the IDEA. The IDEA requires that parents be given advance notice of a "proposed change in the educational placement" of their child. Hendrick Hudson Dist v. Rowley, 458 U.S. 176, 182 (1982). However, case law interpreting the phrase "educational placement" makes it abundantly clear that "educational placement" refers to the disabled child's education program or curriculum in which that child is enrolled, *and not the physical location* for where that program is to be administered. See Middlebrook v. Knox, Tennessee, 805 F. Supp. 534, 541 (E.D. Tenn. 1991) ("A change in the school building in which a disabled student receives his or her education is not necessarily a change in educational placement for the purposes of the Federal IDEA.") Further, "an educational placement, for the purposes of EAHCA [IDEA], is not changed unless a fundamental change, or elimination of, a basic element of the educational program has occurred." Sherri A.D. v. Kirby, 975 F.2d 193, 206 (5th Cir. 1992). The 5th Circuit Court of Appeals in Weil held that a transfer of a disabled student from one school to another, where both schools provided substantially similar classes, and both implemented the same IEP for the student, did not constitute a change in "educational placement", Weil v. Board of Elementary & Secondary Education, 931 F.2d 1069 (5th Cir. 1991). And finally in Ascension Parish Sch. Bd., 39 IDELR 182 (August 13, 2003), the court held that the "educational placement" as used in the IDEA,

means educational program---not the particular institution where that program is implemented."

The IDEA provides parents of a child with a disability, the right to obtain an Independent Educational Evaluation for that child. (34 CFR 300.502) If the parent requests that the IEE be at public expense, the regulations say that the parent has that right "if the parent disagrees with an evaluation obtained by the public agency." and if the public agency does not initiate a hearing to show that its' evaluation is appropriate. [34 CFR 300.502(b)(1), (2)(i)]. If the school district agrees to pay for the IEE then the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria used by the public agency when it initiates an evaluation. To the same extent those criteria are consistent with the parent's right to an independent educational evaluation" [34 CFR 00.502(e)(1)].

If the parents initiate and pay for an IEE themselves, then the school system is required to consider the results of that evaluation in any decision made with respect to the education of the child, provided that the evaluation meets agency criteria [34 CFR 300.502(c)(1)]. There is no specific definition of "consider" with respect to an IEE nor is there any weight that must be assigned to the IEE. It would seem the definition of "consider"- to reflect on or think about with some degree of care or caution"--- would be appropriate. See T. S. ex rel. S. S. v. Board of Education of the Town of Ridgefield, 20 IDELR 889 (2nd Cir. 1993).

Under 34 CFR 300.502(b)(2)(ii) and 300.502 (e) a district has discretion to establish certain criteria in connection with publicly funded IEE's. The District may establish criteria that restrict the location of the evaluation, the qualification of the examiners and

the fees. If a unique circumstance exists where an out of location examiner is required, the parent is required to justify the reason, Letter to Anonymous, 20 IDELR (OSEP 1993).

The Office of Special Education Programs addresses the issue of whether the policy of limiting the parent's choices of qualified IEE examiners to the LEA's approved lists is inconsistent with a parent's right to an IEE. In Letter to Young, 39 IDELR 98 (March 20, 2003), OSEP responded as follows:

> [T]his Office believes it is not inconsistent with IDEA for the district to maintain, and require parents to use, a list of qualified examiners that meet the same criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an IEE.

IV. ANALYSIS AND CONCLUSIONS

The petitioner has reasoned (T. 55-56) that movement from Page High School to the Alternative Learning Center due to the violation of the zero tolerance offense and the reassignment of D from Page High to his zone school, Ravenwood High, both amount to a change of placement as specified in 34 CFR 300.552. This is not a true comparison. The movement to the Alternative Learning Center is a change in placement due to the fact the Center is a *more restrictive* environment than the student's regular school. However, Page and Ravenwood schools provide the same least restrictive environment to D and therefore educational placement has not been altered by the school district. It then follow that an IEP team is not required when a physical placement (i.e. location) is changed. The requirement in this instance is that the parent be given notice of the change. The school district has given adequate and timely notice in this case. There is no

evidence to suggest the agency abused its' discretion or violated any procedural or constitutional safeguards belonging to D. On the contrary it appears the agency protects due process to parents and their children through creation of an appeals panel that may override or affirm the original decision of a school-zoning dispute. No evidence is submitted that the student's rights are violated by the actions of the Board of Education in making the policy, the administrator's implementation of the policy, nor the Appeals Panel in upholding the decision of the school administrator. On the contrary it appears the principal applied the standard of dismissal for zero tolerance infractions even handedly by directing all out of zone "offenders" back to their zoned schools. This rule of conduct applies to more than one person and it is impracticable to examine it individually here when governing the complex societies of growing student bodies. Accordingly, there is no showing that the welfare and best interests of the pupils as a whole are compromised by the policy nor that the individual's rights are abridged to the point that they outweigh the local education agency objectives and purposes. The finding is that the policy of the local education agency is valid pursuant to the requirements of the statute.

The principal of the school as well as the Student Support Services Coordinator testified D could receive his current IEP services at Ravenwood School. Further the Department Chair for Special education at Page High School, Ms Joann Gallagher, the witness with seemingly the most knowledge of D, opines that the courses the student needed for graduation were offered at the other school (interpretted either). She testifies that returning D to his zoned school of Ravenwood is appropriate. Since November 2003, Mrs. Gallagher had been the most consistent school member attending D's IEP Team meetings. She is well familiar with the student's needs. Also this very

knowledgeable professional stated that the modifications and accommodations of the student's IEP could be completed at the zone school. Nothing unusual existed in the IEP that could only be offered at Page, but to the contrary, Ravenwood could provide an appropriate educational experience. (T. 393-394)

D's attendance at Page High School was pursuant to his and his family's request, and not per a decision of the student's IEP team. No evidence was introduced that D was admitted to Page High School because that was the only school to meet his needs.

Dr. Heath testifies that the school district has committed in most all cases to provide the services necessary for students to receive FAPE in their zone school. He surmised that from 90 to 99 percent of all students with disabilities could receive their services in their zone school (T. 431-32). No credible evidence has been introduced that establishes Ravenwood High School a location where the IEP for D cannot be delivered. D's disabilities do not prevent him from attending any of the county's schools and his needs in written expression and ADHD can be met at Ravenwood High School.

Without any evidence indicating that a transfer to Ravenwood High School would be irreparably and severely detrimental to him academically or emotionally, or the student's IEP could not be implemented, the Commissioner fulfills the duty and obligation to provide a free appropriate public education.

Williamson County Schools has offers a school, Ravenwood High School, where D may receive a Free Appropriate Public Education. It is the student's zone school pursuant to a valid policy and offers the least restrictive environment. That is the Federal mandate under which this court and the school system must perate.

The school system did not have to offer an IEE to the parents for their child since no evaluation had been completed by the school district for the parents to disagree. However, the IEP team agreed with the parents that additional information could help in making programming decisions. Thus the school district agreed to pay for an IEE anticipating payment to one of the licensed psychologists on their list. The regulations regarding IEE's do apply and the criteria under which an IEE can be obtained at public expense. All discussions at the IEP Team meeting used the words IEE and it follows all participants would understand the criteria that must be used for that evaluation.

The parents at no point during the hearing demonstrate the inadequacy or inappropriateness of the four examiners that were listed by the school system. Further, the parents have failed to show that the examiners from Massachusetts meet the federal and state standards for psychological examiners. Nor does the record demonstrate that D's disabilities are so unique that qualified examiners do not exist within the geographic area (represented by the panel provided to D from the school system) to evaluate him.

The parents have, as every parent should do, attempted to protect and see their child receive every benefit that is available under the law. The parents have demonstrated extraordinary efforts and have done a competent job. However, to a great extent this child is the author of his misfortune in that he choose not to conform his conduct to acceptable norms thereby subjecting himself to the consequences of a valid agency policy. My job is to interpret the law as it is and not as we might like it to be. The policy has been applied evenly. Additionally, the law is very clear regarding the difference between educational placement and physical placement. Williamson County Schools has the authority to assign D to Ravenwood High School so long as a free

appropriate public education can be provided. Further. when the parent's rejected the offer to select their choice from a panel of regional professionals they did so at their peril. The finding then is that the parents are not entitled to full reimbursement for the IEE but only a commensurate amount that would be paid to a panel examiner for analogous services.

IV. FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. Claimant D is a protected individual under the applicable laws. rules, regulations and policies and is subject to all rights, privileges and obligations; and
2. The evidence establishes that claimant D has not been deprived of any liberty, property or right; and
3. All parties testifying are credible; and
4. The policy relocating the student to his zoned school of the local education agency is reasonable and within statutory authorization; and
5. The zone school is presently equipped to provide the student with a Free Appropriate public education; and
6. The local education agency provided a fair and qualified panel of professionals to complete an Independent Educational Evaluation; and
7. D choose an examiner not on the list provided.
8. The Commissioner of Education has met the statutory charge in providing special education services to this student; and
9. The local education agency is the prevailing party; ACCORDINGLY

V. DECISION

IT IS HERBY ORDERED that D shall be enrolled in his zone school of Ravenwood High School where his IEP shall be implemented; and

FURTHER IT IS ORDERED that the parents may submit the IEE at the IEP Team meeting, which shall be convened within the next 14 school days, to consider the findings and proposals of the evaluation. If the parents submit the IEE from the Educational

Enhancement Center at Massachusetts then the District shall reimburse the parents in the amount of One Thousand, Two Hundred and No/100 (S1,200.) Dollars. If the parents elect not to submit the IEE to the IEP Team for them to consider then the school district shall not be liable for any reimbursement for the IEE.

THIS DECISION IS BINDING UPON ALL PARTIES UNLESS APPEALED. Any party aggrieved by the findings and decision is entitled to judicial review may appeal to the County Chancery Court of the State of Tennessee or may seek review in the United States District Court for Tennessee. Alternatively. a person who is aggrieved by the final determination of a Administrative Law Judge in a special education hearing conducted pursuant to Tennessee Code Annotated § 49-10-601 may file a petition for review in the Chancery Court of Davidson County or in the county in which the Petitioner resides. Such an appeal must be filed within Sixty (60) days after the entry of the agency's final order in non-reimbursement cases and within three (3) years in cases involving reimbursement of educational costs and expenses. In appropriate cases this Final Order may be stayed but the filing or the petition for review does not itself stay enforcement of an agency decision.

ENTER this the 13th day of September 2004.

STATE OF TENNESSEE
DEPARTENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION

BY:_____
William Jay Reynolds (013932)
Administrative Law Judge
55 Court Street, Suite A
Savannah, Tennessee 38372
(731) 925-7000

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Final Order was mailed on the ___day of September 2004 to: counsel for the school system, parents of the student, and the Tennessee Department of Education, Division of Special Education, Nashville, Tennessee.

_____
William Jay Reynolds